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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

IN RE FEDERAL-MOGUL GLOBAL, INC.

DAIMLERCHRYSLER CORPORATION,
FORD MOTOR COMPANY, AND
GENERAL MOTORS CORPORATION,

Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF
FEDERAL-MOGUL GLOBAL, INC., ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That The Denial Of A Transfer Motion Under 28 U.S.C. § 157(b)(5) Is Not Appealable 1

II. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That A Cross-Jurisdictional Remand Is Not Appealable 4

III. This Case Presents Issues of Signal Importance ... 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

A.H. Robins Co. v. Piccinin,
788 F.2d 994 (4th Cir. 1986) 1, 2

Behrens v. Pelletier,
516 U.S. 299 (1996) 6

Briscoe v. LaHue,
460 U.S. 325 (1983) 3

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 7

Clark Cty. Sch. Dist. v. Breeden,
532 U.S. 268, 269 (2001) 6

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 4, 5

Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 6

Georgine v. Amchem Prods., Inc.,
83 F.3d 610 (3d Cir. 1996),
aff'd, 521 U.S. 591 (1997) 7

Hudson-Ram L.P. v. Archer,
210 F.3d 387, 2000 WL 14398
(9th Cir. Jan. 7, 2000) 5, 6

In re Dow Corning Corp.,
86 F.3d 482 (6th Cir. 1996) 1-3, 7, 8

In re Saco Local Dev. Corp.,
711 F.2d 441 (1st Cir. 1983) 1

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 6

Portland Golf Club v. CIR,
497 U.S. 154 (1990) 6

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993) 6

Thermtron Products, Inc. v. Hermansdorfer,
423 U.S. 336 (1976) 3, 4

Things Remembered, Inc. v. Petrarca,
516 U.S. 124 (1995) 4

Torres v. Oakland Scavenger Co.,
487 U.S. 312 (1988) 6

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 3

STATUTES:

28 U.S.C. § 157(b)(5) 1-3

28 U.S.C. § 1334(b). 4, 7

28 U.S.C. § 1447(c) 4, 5

28 U.S.C. § 1452(b) 3-5

I. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That The Denial Of A Transfer Motion Under 28 U.S.C. § 157(b)(5) Is Not Appealable.

The motions that were actually decided by the district court below, in the decision over which the Third Circuit held that it lacked appellate jurisdiction, were petitioners' "motions to *transfer* the Friction Products Claims." Pet. App. 56a (emphasis added). Under the Sixth Circuit's decision in *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996), an order denying such motions is appealable as both a "final" and a "collateral" order. *See id.* at 487-88. The district court below, however, attempted to insulate its decision from review by also purporting (in the very same order denying the motions to transfer) to "remand" these claims directly to the state courts from which they had been removed, thereby allowing respondents to argue that the order was unreviewable as a remand order. And that is precisely what respondents did argue in the Third Circuit, and argue again here.

The Third Circuit, however, did not accept respondents' characterization of the district court's order as a remand order. Rather, the Third Circuit held that the district court's order was unappealable *when construed as the denial of a transfer motion under 28 U.S.C. § 157(b)(5)*. *See* Pet. App. 19a-20a. That holding is not only manifestly incorrect, but also flatly inconsistent with the Sixth Circuit's holding in *Dow Corning*. *See* 86 F.3d at 487-88.

Respondents do not even attempt to defend the Third Circuit's holding on the merits. That is not surprising, because it is well-established (or was, until the ruling below) that a relaxed standard of finality applies in bankruptcy cases, where orders are "final" (and hence appealable) where "they finally dispose of *discrete disputes within the larger case*." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.) (emphasis in original). As the Sixth Circuit recognized in *Dow Corning*, the denial of a transfer motion under Section 157(b)(5) easily meets this standard: whether claims against nondebtors are "related to" a

particular bankruptcy is a discrete question separate from the claims at issue in the underlying bankruptcy, and would be "effectively unreviewable" by appeal years later upon confirmation of the debtor's final plan of reorganization. 86 F.3d at 487-88. Indeed, for just this reason, the *Dow Corning* court held that the denial of a transfer motion under Section 157(b)(5) is appealable as *both* a "final" judgment *and* a "collateral" order. *See id.*; *see also A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (holding that the grant or denial of a Section 157(b)(5) transfer motion is appealable as both a final and a collateral order).

While respondents conspicuously do *not* defend the decision below on the merits, they *do* deny the existence of a circuit split on this issue. *See* Opp. 21-23 & n.6. According to respondents, the Sixth Circuit's decision in *Dow Corning* (and the Fourth Circuit's decision in *A.H. Robins* on which it relied) are distinguishable from this case because the district courts in those cases had not also entered orders "remanding the claims at issue to the state courts." *Id.* at 21; *see also id.* at 23 n.6. But here respondents are simply quarreling with the Third Circuit's decision that the district court's order was unappealable *when construed as the denial of a transfer motion.* Pet. App. 19a-20a. Petitioners may *wish* the Third Circuit had held that the denial of a transfer motion is unappealable when coupled with a remand order, but that is not what the Third Circuit did. *See id.* Under the decision below, the law in the Third Circuit is that orders denying transfer motions under Section 157(b)(5) are unappealable, *see id.*, while the law in the Sixth Circuit is precisely the opposite, *see* 86 F.3d at 487-88. If that is not a circuit split, it is hard to know what is.

Indeed, as respondents themselves implicitly acknowledge, *see* Opp. 18-19, it is wholly illogical to couple the denial of a transfer motion with a remand order, because those dispositions are inherently inconsistent and mutually exclusive. An order denying a transfer motion sends the

claims back to the *federal* courts to which they were removed (and from which they were provisionally transferred), whereas a remand order sends the claims back to the *state* courts from which they were removed. A single order cannot logically send the same claims back to both fora at once. For the district court to deny the transfer motions *after* remanding the claims, as respondents suggest, *id.* at 19, would have been a meaningless act, because the court would have had before it *no* claims to send back to the federal courts from which they had been provisionally transferred.

It is not surprising, thus, that the Third Circuit took the district court at its word and reviewed the challenged order *both* as the denial of a transfer motion *and* as a remand order, *see* Pet. App. 19a, and held that it was unappealable as *either*, *see id.* at 19a-20a, 31a-36a. Those are not alternative holdings: each one is logically necessary to the Third Circuit's judgment dismissing petitioners' appeals for lack of jurisdiction. Because the Court of Appeals declined to characterize the challenged order, it could not have dismissed petitioners' appeals from that order without holding that it lacked jurisdiction *both* over the denial of a Section 157(b)(5) transfer motion *and* over a cross-jurisdictional remand order. Accordingly, both of those holdings are squarely and properly presently here, regardless of the validity of the Court of Appeals' alternative assumptions underlying those holdings. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions."); *Briscoe v. LaHue*, 460 U.S. 325, 328 n.3 (1983) ("Because we granted certiorari to review the Court of Appeals' holding, we make the same assumptions for purposes of deciding this case, without implying that they are valid."). Respondents cannot insulate the Third Circuit's holding on the appealability of Section 157(b)(5) transfer orders from this Court's review by simply challenging the validity of the assumption underlying that holding.

Contrary to respondents' assertion, thus, it is simply not true that "[a]t the appellate level, the issue of 'transfer' was completely irrelevant . . . [and] no longer presented a justiciable case or controversy." Opp. 18. Petitioners challenged (and continue to challenge) the district court's denial of their transfer motions, and respondents defended (and continue to defend) that denial. The Third Circuit specifically and expressly held that the district court's order, when construed as the denial of a transfer motion under 28 U.S.C. § 157(b)(5), is not appealable, Pet. App. 19a-20a, and that holding squarely conflicts with the Sixth Circuit's contrary holding in *Dow Corning*, 86 F.3d at 487-88. This Court's review is warranted to correct the Third Circuit's error, and resolve the resulting circuit conflict.

II. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That A Cross-Jurisdictional Remand Is Not Appealable.

The Third Circuit also held that, when construed as a remand order, the district court's order was *again* unappealable, notwithstanding the fact that the district court purported to "remand" claims that had been removed to *other* federal courts and then transferred. Pet. App. 31a-36a. Because any such remand was unauthorized by the bankruptcy remand statute—which specifically limits the remand power to "[t]he court to which such claim or cause of action is removed," 28 U.S.C. § 1452(b)—the Third Circuit thereby erred. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). And that error created not one but two circuit splits: one on whether remands based on an asserted lack of subject-matter jurisdiction are unappealable even if *otherwise* beyond the district court's statutory authority, *see* Pet. 18-21, and the other on whether a court other than "[t]he court to which [a bankruptcy claim] is removed" has the statutory authority to remand such a claim, *see id.* at 21-24.

Respondents contend in a footnote that the first of those splits is not implicated here because "[n]othing in the court of appeals' discussion suggests" a holding that remands based on lack of subject-matter jurisdiction are unappealable even if *otherwise* beyond the district court's statutory authority. Opp. 17 n.4. That contention is mystifying, because the Third Circuit could scarcely have been any more explicit on this score. The Third Circuit expressly rejected petitioners' argument that the district court's order was appealable under *Thermtron* by holding that *Thermtron* (as allegedly "clarified" by *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995)) simply did not apply to remand orders based on lack of subject-matter jurisdiction. Pet. App. 34a. According to the Third Circuit, "[a]s the basis for the District Court's remand in this case was lack of subject matter jurisdiction (the absence of 'related to' jurisdiction), *appeal is . . . barred*." *Id.* (emphasis added). Respondents may be unwilling to defend that holding, but they cannot simply deny its existence. And it is telling that respondents do not deny that at least four other circuits have held that *Thermtron* and *Things Remembered* authorize appellate jurisdiction over remand orders based on lack of subject-matter jurisdiction where a district court *otherwise* exceeds its statutory authority. *See* Pet. 19-21. Because those holdings conflict with the decision below, *see* Pet. App. 34a, this Court's review is warranted.

Respondents also attempt to deny a circuit split on the validity of direct cross-jurisdictional remands under the bankruptcy remand statute, 28 U.S.C. § 1452(b), by asserting that this statute "has no bearing here" at all. Opp. 15. According to respondents, the remands in this case are governed exclusively by the *general* remand statute, 28 U.S.C. § 1447(c), even though the claims in this case were removed from state to federal court under the *bankruptcy* removal statute, 28 U.S.C. § 1452(a), as "related to" the Federal-Mogul bankruptcy within the meaning of the *bankruptcy* jurisdictional statute, 28 U.S.C. § 1334(b).

Needless to say, respondents turn the law upside down by asserting that the *bankruptcy* remand statute is wholly irrelevant to *bankruptcy* remands.

Respondents purport to base that extraordinary assertion on this Court's decision in *Things Remembered,* but that reliance is misplaced. *Things Remembered* held only that courts must apply both the general remand statute and the bankruptcy remand statute where both provisions can "comfortably coexist," 516 U.S. at 129 (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992))—as in that case, where both provisions precluded review of a remand order, and there was no asserted inconsistency between them. That holding is based on the venerable principle that courts are required to reconcile the various provisions of the U.S. Code whenever possible. *See, e.g., Germain*, 503 U.S. at 253. But respondents turn that principle on its head by asking this Court to *ignore* the specific language of the bankruptcy remand statute, 28 U.S.C. § 1452(b), in evaluating the validity of a bankruptcy remand. *Things Remembered* does not remotely authorize courts to use the general remand provision to override the bankruptcy remand provision where (as here) the provisions differ. The specific may not always trump the general, but the general certainly does not trump the specific.

Thus, respondents miss the point by focusing exclusively on the general remand statute, and acting as if the bankruptcy remand statute did not exist. Regardless of whether the general remand statute authorizes a remand by a court other than the court to which a claim was removed, the bankruptcy remand statute plainly does not. The claims in this case were removed from state courts across the Nation to the local federal courts, and then provisionally transferred to the federal court in Delaware. The latter court, therefore, was not "[t]he court to which such claim or cause of action [was] removed," 28 U.S.C. § 1452(b), and therefore was not authorized to remand the claims.

That, in fact, is precisely the holding of the Ninth Circuit in *Hudson-Ram L.P. v. Archer,* 210 F.3d 387, 2000 WL 14398 (9th Cir. Jan. 7, 2000) (unpublished). Respondents do not contest this point, but instead deny the existence of a conflict on the ground that "[t]he remand order in that case was entered under § 1452(b)," rather than § 1447(c). Opp. 16. That argument makes no sense. If, as defendants argue, Section 1447(c) trumps Section 1452(b) even with respect to claims removed under the bankruptcy removal statute, then *Hudson-Ram* was incorrectly decided. *Hudson-Ram* is indistinguishable from this case: there, as here, claims were removed from state to federal court under the bankruptcy removal statute, and then transferred to another federal court, which purported to remand them directly to the original state court. 2000 WL 14398, at *1. The Ninth Circuit held that it could review the case because "this was not a proper 'remand,'" *id.*; the Third Circuit held the opposite, *see* Pet. App. 34a-36a. Again, if this is not a circuit split, it is hard to know what is.

In the alternative, petitioners argue that the Ninth Circuit's decision in *Hudson-Ram* "could not create a 'conflict' requiring resolution by this Court" because it is unpublished. Opp. 16. Respondents cite no authority for that proposition, which is not surprising because none exists. To the contrary, this Court frequently reviews unpublished decisions of the Courts of Appeals, *including* the Ninth Circuit. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 430 (2001) (reviewing *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 1999 WL 1216844 (9th Cir. Dec. 17, 1999) (unpublished)); *Clark Cty. Sch. Dist. v. Breeden,* 532 U.S. 268, 269 (2001) (*per curiam*) (reviewing *Breeden v. Clark Cty. Sch. Dist.,* 2000 WL 991821 (9th Cir. July 19, 2000) (unpublished)); *Behrens v. Pelletier,* 516 U.S. 299, 305 (1996) (reviewing *Pelletier v. Federal Home Loan Bank of San Francisco*, No. 94-56507 (9th Cir. Nov. 17, 1994) (unpublished)); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452 (1993) (reviewing

McQuillan v. Sorbothane, Inc., 1990 WL 92599 (9th Cir. July 3, 1990) (unpublished)); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354 (1991) (reviewing *Catalan v. Paulson Inv. Co.*, No. 88-4099 (9th Cir. Feb. 5, 1990) (unpublished)); *Portland Golf Club v. CIR*, 497 U.S. 154, 159 (1990) (reviewing *Portland Golf Club v. CIR*, 1989 WL 61765 (9th Cir. June 1, 1989) (unpublished)); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (reviewing *Martinez v. Oakland Scavenger Co.*, No. 85-2903 (9th Cir. Dec. 11, 1986) (unpublished)). Indeed, were the law otherwise, a court of appeals could insulate its decision from this Court's review by simply declining to publish it. The fact that the Ninth Circuit chose not to publish its decision in *Hudson-Ram* (presumably because the statutory language on which that decision is based is so straightforward) provides no basis for declining to review the conflict between that decision and the decision below.

III. This Case Presents Issues Of Signal Importance.

The welter of circuit splits described above underscores how desperately this Court's guidance is needed in this area of the law, but should not deflect attention from the signal importance of this particular case in its own right. This case presents the question whether the American judiciary can address "mass tort" claims—particularly asbestos claims—in a fair and rational way. Right now, that is not the case: as the Third Circuit noted more than six years ago,

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Georgine v. Amchem Prods., Inc., 83 F.3d 610, 619 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997). Since then, the problem

has only worsened, as the onslaught of asbestos claims has engulfed not only asbestos manufacturers, but also "Main Street" American businesses, including petitioners.

Respondents try to downplay the importance of this case by arguing that global *Daubert* hearings on the scientific validity of the friction product claims "can be conducted, if the courts deem them useful, without petitioners' being present" in particular bankruptcy proceedings. Opp. 23. That argument makes no sense. Congress granted the federal bankruptcy courts "comprehensive jurisdiction" precisely so that they "might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (internal quotation omitted). To conduct *Daubert* hearings with respect to claims against the debtor, but not against parties (like petitioners) with enormous contingent indemnification and/or contribution claims against the debtor, would turn the law upside down, because it would leave the bankruptcy estate open to substantial additional liability.

That is precisely why the Sixth Circuit recognized in *Dow Corning* that personal injury claims against nondebtors based on products manufactured by the debtor are necessarily "related to" the bankruptcy within the meaning of 28 U.S.C. § 1334(b). 86 F.3d at 488-94. As that court explained,

> The claims currently pending against the nondebtors give rise to contingent claims against [the debtor] which unquestionably could ripen into fixed claims. The potential for [the debtor]'s being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by [the debtor], obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as

> [the debtor]'s ability to resolve its liabilities and proceed with reorganization.

Dow Corning, 86 F.3d at 494. The district court below recognized that its holding denying "related to" jurisdiction over the claims in this case was probably "impossible to reconcile" with *Dow Corning*, which "came to the opposite conclusion on a remarkably similar set of facts," but opined that the Sixth Circuit was "wrong." Pet. App. 68a.

The Third Circuit acknowledged the conflict between the district court's ruling in this case and the Sixth Circuit's ruling in *Dow Corning*, Pet. App. 28a-29a, but held that "[w]e . . . remain a step away from reaching the merits of whether the District Court has 'related to' jurisdiction" because appellate jurisdiction was lacking, *id.* at 30a. Accordingly, the Third Circuit held only that petitioners "have not met th[e] rigorous standard for the issuance of the extraordinary writ of mandamus as to the District Court's denial of the motion to transfer," *id.*, thereby avoiding the critically important question whether "related to" bankruptcy jurisdiction extends to claims against nondebtors based on products manufactured by the debtor.

In avoiding that question, however, the Third Circuit seriously distorted basic principles of appellate jurisdiction, and effectively gave district courts a roadmap for evading appellate review of decisions involving bankruptcy jurisdiction. This Court's review is thus warranted not only to resolve the welter of circuit splits described above, but to prevent the vital underlying issues of bankruptcy jurisdiction presented here from being wholly insulated from appellate review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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